

#04-7984

P.L. 8400114



July 12, 2004

**VIA E-MAIL AND FIRST CLASS MAIL**

Substance Abuse and Mental Health Services  
Administration  
Department of Health and Human Services  
5600 Fishers Lane  
Rockwall II, Suite 815  
Rockville, MD 20852

Re: Comments to Proposed Revisions to Mandatory Guidelines for Federal  
Workplace Drug Testing Programs, 69 Fed. Reg. 19673 (April 13, 2004),  
Docket Number 04-7984

Dear Sir or Madam:

The National Treasury Employees Union (NTEU) submits these comments to the Substance Abuse and Mental Health Services Administration's (SAMHSA) Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs, which were published for public comment in the *Federal Register* on April 13, 2004. NTEU represents over 150,000 federal employees nationwide who are subject to the Drug Testing Program and who could suffer serious adverse effects if the guidelines are adopted without modification.

The Secretary of Health and Human Services has the responsibility to establish standards for all aspects of laboratory drug testing for federal employment. Those standards must "require the use of the best available technology for ensuring the full reliability and accuracy of drug tests..." 53 Fed. Reg. 11970 (April 11, 1988). As the Department has acknowledged again here, it must identify and use "the most accurate, reliable drug testing technology available." 69 Fed. Reg. at 19674. The proposed guidelines do not meet those requirements, for they permit the adoption of testing methods whose "full reliability and accuracy" has not yet been established (and, indeed, may never be established).

**Sweat Testing**

Section 2.2 would permit the use of sweat patches to test for drug use in two circumstances: prior to reinstatement in a testing-designated position, and after reinstatement as a follow-up to ensure that the donor remains drug-free. While we are pleased that the sweat testing is not proposed for pre-employment, random, or reasonable suspicion/cause testing, we



are convinced that sweat testing is not sufficiently reliable for use even in these more limited circumstances.

SAMHSA itself has acknowledged its concern that the "sweat patch" used in sweat testing can be contaminated by drugs in the environment (as, for example, by marijuana smoke in the air at a party or concert). See 69 Fed. Reg. at 19676 ("contamination issues continue to be a concern"). Apparently the most that it can say with confidence is that it "believes that external absorption of any drugs through the outer layer is not possible under normal circumstances" (*id.*, emphasis supplied). It admits that "further research" is necessary on this point. *Id.* at 19677. Until the technology has been refined to the point that SAMHSA is able to declare with greater certainty that contamination is not possible and that its certainty extends to all but the most extraordinary circumstances, it must not approve its use.

It is NTEU's understanding that there are several independent scientific studies that show that the sweat patch can give false positive results. We are aware of at least 14 scientists who have reported in published articles that sweat patches should not be used as a stand-alone indicator of drug use, due to the risk of false positives. Moreover, studies of nondrug-users who are tested via a sweat patch have shown a false positive rate of as much as 40%. That is obviously unacceptably high.

In short, NTEU objects to sweat testing because the technology has not yet been demonstrated to be reliable and accurate.

### Hair Testing

The draft regulations permit hair testing for pre-employment drug testing, random testing, as well as "return to duty" and "follow-up." Section 2.2. This broad usage is inappropriate because hair testing can yield false positives for two reasons: environmental contamination and type of hair tested. SAMHSA admits that these risks are of "particular concern" (69 Fed. Reg. at 19675) and that there are only a "limited number" of human clinical control tests on the effect of hair pigmentation, but still proposes to go forward in the face of "these suspected limitations." *Id.* at 19675-19676. NTEU takes strong exception to this position.

It is clear that minute amounts of drugs in the environment can bind to the hair and even change over time in a way that mimics the effect of drug use. We have been informed that no industry method to "clean" such environmentally-contaminated hair has been shown to be effective. Significantly, the regulations do not require that any such cleaning process be implemented. Moreover, there are studies indicating that SAMHSA is wrong when it claims that current tests can distinguish between the hair of a drug user and the hair of someone who has simply been exposed to drugs in the environment. Published, peer-reviewed research has shown that externally contaminated hair yields test results similar to those of the hair of a drug-user.

Even more troubling is the hair-color bias, which may translate to racial bias, when hair is tested for drugs. It is well established that dark-colored hair incorporates drugs more rapidly than light-colored hair. Individuals with dark hair are thus especially likely to receive false positive results from environmental contamination. Moreover, individuals with dark hair will

test positive more frequently than individuals with light hair, given similar drug use patterns. This, of course, will translate into a racial bias, if large numbers of people are tested.

NTEU objects most strenuously to the proposed use of a test with such an inherent racial bias.

### Saliva Testing

SAMHSA proposed to permit saliva testing in numerous situations: pre-employment testing, random testing, reasonable suspicion/cause testing, and post-accident testing. Section 2.2. Once again, it has erred in permitting testing by an insufficiently studied method.

The technology of saliva testing has been the subject of only a few tests and is not well understood by scientists. Moreover, those preliminary studies have indicated that, at least with respect to testing for marijuana, scientists using saliva testing are currently unable to differentiate between actual marijuana use and environmental contamination. SAMHSA therefore has been forced to require the testing of a second specimen (urine) at the same time as the saliva is obtained, in order to rule out environmental contamination. 69 Fed. Reg. at 19676. This necessary redundancy sharply undermines arguments in favor of saliva testing.

We further note that there can be significant collection difficulties associated with the saliva testing. For example, some individuals suffer from "dry mouth." Means for stimulating saliva flow (such as chewing gum), as well as some saliva collection devices, can affect the results. These collection problems cannot be easily dismissed, as proposed by SAMHSA, merely based on its belief that "oral fluid testing may be useful in certain missions and tasks that only individual Federal agencies can identify." *Id.* Individual federal agencies do not have the expertise that SAMHSA attributes to them, and abuses will follow.

### POCT Testing

NTEU is very troubled by the proposal to permit "point-of-collection testing" (POCT) for saliva and urine, or testing in the field with devices that give immediate results. As SAMHSA admits, POCT "offers a particular challenge" to the drug-testing program, because the agency is, in effect, conducting a laboratory test in the field. *Id.* at 19684. In the face of these acknowledged difficulties, SAMHSA has improperly abdicated its mandated oversight role to federal agencies engaged in testing their own employees (or potential employees). It has given to these agencies the responsibility for ensuring compliance with drug-testing standards. Those agencies are not equipped to exercise that responsibility.

Federal agencies wishing to use POCT testing would be required to develop procedures for field testing; train and certify testers; ensure that the procedures developed were actually followed; and develop and implement quality controls. This will include the investigation of errors and the identification of their cause. These tasks are highly complex and technical. NTEU has no confidence whatsoever that federal agencies will be able to meet these responsibilities without committing numerous mistakes. These mistakes will lead to more

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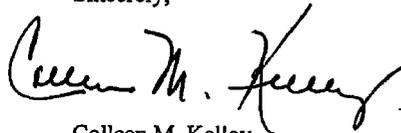
wrongly accused employees and will be very costly for the federal government, both in financial terms and in undermining employee morale.

In sum, NTEU has very strong reservations about key elements of the proposed revisions to the Mandatory Guidelines. As set forth above, we believe that SAMHSA is relying on unproven technology that has an unacceptably high risk of false positives. Moreover, one form of testing has an inherent racial bias. Finally, it is improperly abdicating its oversight responsibilities for POCT testing to individual agencies that are not equipped to exercise those responsibilities.

The false positive results and the errors in testing that will inevitably follow, should these guidelines be finalized, could have very serious repercussions for the federal workplace. Hard-working federal employees—only a miniscule percentage of whom have ever tested positive for drugs—deserve better than this from their employer. The taxpayer, as well, deserves better. SAMHSA has proposed a program that is likely to be very costly in terms of time and agency expenditures, even though the scientific validity and practical necessity are as yet undetermined.

We urge SAMHSA to reconsider its proposed revisions.

Sincerely,

A handwritten signature in black ink, appearing to read "Colleen M. Kelley". The signature is fluid and cursive, with the first name "Colleen" being the most prominent part.

Colleen M. Kelley  
National President